Supreme Court, U.S.
FILED

No. 10-386 MAY 13 2010

In The Supreme Court of the United States

OFFICE OF THE CLERK

MAIDA NUSSBAUM, ET VIR,
Petitioners,

V.

ISER KORICKI MIGUELACHULI, ET AL.,
Respondents.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT
OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI

Arthur M. Schwartzstein
(Counsel of Record)
Arthur M. Schwartzstein, P.C.
1420 Spring Hill Road, Suite 600
McLean, Virginia 22102-3030
(703) 749-1282

Jack D. Lapidus
Macleay, Lynch, Gregg & Lynch, P.C.
1629 K Street, N.W., Suite 802
Washington, DC 20006
(202) 785-0123

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Can the local courts of Puerto Rico disregard federal law, as construed in *United States v. Chandler*, 410 U.S. 257 (1973), in favor of commonwealth law so as to fully divest the ownership interest of a certificated owner of Ginnie Mae bonds, purchased in conformity with federal regulations, with the result that future questions involving ownership of federally backed and regulated securities are dependent on inconsistent variations in each state's laws?

THE PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Iser Koriki Miguelachuli and Bertha Miguelachuli--Plaintiffs; RG Premier Bank of Puerto Rico, RG Investments Corporation and RG Mortgage Corporation--Defendants/Third Party Plaintiffs; and Maida Nussbaum (a.k.a. Maida Koricki, Edward Nussbaum and the Conjugal Partnership Comprised by Both)—Third Party Defendant. There are no parent companies, subsidiaries or affiliates associated with the petitioner, Maida Nussbaum (a.k.a. Maida Koricki, Edward Nussbaum and the Conjugal Partnership Comprised by Both).

TABLE OF CONTENTS

QUESTION PRRESENTED i

THE PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 20

APPENDIX:

ALL DOCUMENTS ARE CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPTION FROM ITS ORIGINAL BY AIDA TORRES, CERTIFIED INTERPRETER, ADMINISTRATIVE OFFICE OF THE UNITED SATES COURT:

NOTICE OF RESOLUTION OF THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO, DATED DECEMBER 18, 2009 ..... A1

RESOLUTION OF THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO, DATED DECEMBER 11, 2009 ..... A3

JUDGMENT OF THE COURT OF APPEALS OF THE COMMONWEALTH OF PUEERTO RICO, DATED MAY 14, 2009 ..... A4

NOTIFICATION OF JUDGMENT OF THE COURT OF FIRST INSTANCE, COMMONWEALTH OF PUERTO RICO, DATED NOVEMBER 7, 2008 ..... A22

PARTIAL JUDGMENT OF THE COURT OF FIRST INSTANCE, COMMONWEALTH OF PUERTO RICO, DATED OCTOBER 17, 2008 ..... A24

NOTIFICATION OF JUDGMENT, COURT OF FIRST INSTANCE, COMMONWEALTH OF PUERTO RICO, DATED NOVEMBER 7, 2008 ..... A46

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, DATED FEBRUARY 23, 2007 ..... A48

TABLE OF AUTHORITIES

CASES

Ex Parte de Jesus, 68 P.R.R. 646 (1948).....19

Free v. Bland, 369 U.S. 663 (1962).....15

Miguelachili v RG Premier Bank of Puerto Rico,
2007 U.S. Dist. LEXIS 12865 (D.P.R. 2007).....1

Estate of Nakdimen, 83 P.R.R. 441 (1961).....19

United States v. Chandler,
410 U.S. 257 (1973).....17, 18, 19

STATUTES

12 U.S.C. 1716 .....6, 12

12 U.S.C. 1721(g)) 2

12 U.S.C. § 1721(g)(3)(E)(iv).....7

28 U.S.C. § 1723i.....7

28 U.S.C. § 1258.....1

24 C.F.R. 320.1 .....2, 6

24 C.F.R. § 320.5 7

OTHER

Ginnie Mae Bond Guide 5500.3 (Rev. 1).....7, 8, 12

PETITION FOR WRIT OF CERTIORARI

Maida Nussbaum (a/k/a Maida Koricki, Edward Nussbaum, and the Conjugal Partnership Comprised by Both) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico.

OPINIONS BELOW

The decision of the Supreme Court of Puerto Rico denying Petitioner's petition for certiorari was issued on December 11, 2009. This order is not reported and is reproduced in a certified translation in the Appendix ("App") at 1-3. The decision of the Court of Appeals of Puerto Rico was issued on May 14, 2009. It is not reported and is reproduced in a certified translation in the Appendix at 4-23. The order of the Court of First Instance was issued on October 17, 2008. It is not reported and is reproduced in a certified translation in the Appendix at 24-47. The decision of the United States District Court for the District of Puerto Rico remanding the case after removal is reported at *Miguelachili v RG Premier Bank of Puerto Rico,* 2007 U.S. Dist. LEXIS 12865 (D.P.R. 2007) and reproduced in the Appendix at 48-54.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1258. The judgment of the Supreme Court of Puerto Rico was entered on December 11, 2009. Petitioners' motion for an extension of time to file

this petition for certiorari to May 10, 2010 was granted by Justice Breyer, on February 10, 2010.

REGULATORY PROVISIONS INVOLVED

Pursuant to 24 C.F.R. 320.1 the Government National Mortgage Association ("GNMA"):

> The Association is authorized by section 306(g) of the National Housing Act (12 U.S.C. 1721(g)) upon such terms and conditions as it may deem appropriate, to guarantee the timely payment of principal of and interest on securities that are based on and backed by a trust or pool composed of mortgages which are insured or guaranteed by FHA, FmHA or VA. The Association's guaranty of mortgage-backed securities is backed by the full faith and credit of the United States. This subpart is limited to "modified pass-through" securities, and does not purport to set forth all the procedures and requirements that apply to the issuance and guaranty of such securities. **All such transactions are governed by the specific terms and provisions of the Association's Mortgage-Backed Securities Guides (MBS Guides) and contracts entered into by the parties.**

(emphasis added).

Excerpts from GNMA MBS Guide
Ginnie Mae 5500.3, Rev. 1

APPENDIX XII-3
UNITED STATES TREASURY DEPARTMENT -- GENERAL REGULATIONS WITH RESPECT TO UNITED STATES SECURITIES

DEPARTMENT CIRCULAR NO. 300 · FOURTH REVISION
SUBPART B -- REGISTRATION

Sec. 306.10. **General.** The registration used must express the actual ownership of a security and may not include any restriction on the authority of the owner to dispose of it in any manner, except as otherwise specifically provided in these regulations. The Treasury Department reserves the right to treat the registration as conclusive of ownership. ....

Sec. 306.11. **Forms of registration for transferable securities.** The forms of registration described below are authorized for transferable securities:

(a) Natural persons in their own right. In the names of natural persons who are not under any legal disability, in their own right, substantially as follows:

....

2) Two or more persons - general. Securities will not be registered in the name of one person payable on death to another, or in any form which purports to authorize transfer by less than all the persons named in the registration (or all the survivors). Securities will not be registered in the forms "John A. Doe and Mrs. Mary C. Doe, or either of them" or "William C. Doe or Henry J. Doe, or either of them" and securities so assigned will be treated as though the words "or either of them" do not appear in the assignments.

CHAPTER 12: THE PROSPECTUS, SECURITIES AND SECURITIES MARKETING

12-9: TRANSFER AND EXCHANGE OF SECURITIES

(D) **Non Book-Entry to Non Book-Entry Transfers and Exchanges** An investor that wishes to transfer or exchange a non-book entry certificated security must proceed as follows:

(1) Form Required:

A properly executed assignment form and the physical security must be presented to the CPTA in order to effect the transfer.

APPENDIX IV-3
FORM OF DETACHED ASSIGNMENT

....

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION GUIDELINES FOR SIGNATURE FOR ASSIGNMENT, SIGNATURE AND AUTHORITY GUARANTY AND AN ERASURE OR ALTERATION

Government National Mortgage Association Guaranteed Mortgage-Backed Certificates are fully registered, and to be transferred or repurchased, must be assigned on the reverse side of the certificate or on a completed Ginnie Mae Form of Detached Assignment. ....

I. **Signatures (for assignment).** All signatures to assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

A. ***Individual Owner)(s).*** All registered owners of a certificate must endorse the certificate.

STATEMENT OF THE CASE

This case involves a question as to the ownership of bonds known colloquially as "Ginnie Maes" issued by the Government National Mortgage Association ("GNMA"). The bonds were titled to "Salomon Koricki Libezuk or Maida Nussbaum as tenants in common." Upon the death of Mr. Libezuk, the courts of Puerto Rico improperly applied Puerto Rico law rather than following federal law. Based on local law, the courts completely deprived Ms. Nussbaum of any ownership interest in the certificated bonds. At issue is the supremacy of federal law over state law with respect to the titling and transfer of this class of federally backed securities.

A. Authority for Issuance of Ginnie Mae Bonds.

This case involves financial securities commonly referred to as "Ginnie Maes." The authority to issue a Ginnie Mae bond is based on a grant of authority from GNMA. *See*, Title III of the National Housing Act, 12. U.S.C. §§ 1716 et seq. As part of its authority, GNMA is authorized to adopt "such terms and conditions as it may deem appropriate, to guarantee the timely payment of principal of and interest on [federally guaranteed] securities...." 24 C.F.R. § 320.1. "All such transactions are governed by the specific terms and provisions of the Association's Mortgage-Backed Securities Guides (MBS Guides) and contracts entered into by the parties." *Id.*

Federal authority governs the titling, transfer and payment of these bonds. *See e.g.*, 24 C.F.R. § 320.5 ("the share of the proceeds collected on account of the pool of mortgages is payable only to the registered holder of a security according to the policies established by the Association"); 12 U.S.C. § 1723i (issuer subject to civil penalty for failing to make payment to the registered holder); Ginnie Mae Bond Guide 5500.3 (Rev. 1) Ch 4-3 (issuer required to maintain register of security holders). Federal Law further specifies that:

> No State or local law, and no Federal law (except Federal law enacted expressly in limitation of this clause after the effective date of this subparagraph) shall preclude or limit the exercise by the Association of its power to contract with persons or entities, and its rights to enforce such contract, for the purpose of ensuring the efficient and continued operation of the multiclass securities program.

12 U.S.C. § 1721(g)(3)(E)(iv).

Appendix XII-3 of the GNMA Guide sets forth the rules with regard to titling of the bonds. Pursuant to § 306.10, "the registration used must express the actual ownership of the security and may not include any restriction on the authority of the owner to dispose of it in any way except as otherwise specifically provided in these regulations. The Treasury Department reserves the right to treat

the registration as conclusive of ownership." GNMA Guide, Appendix XII-3 at § 306.10.

While the ownership interest expressed on the certificated bond is transferable, the governing regulations provide that such interest may not be transferred unless a properly executed form is completed. *See*, GNMA Guide § 12-9(D). That form must identify the exact name of each registered holder as it appears on the face of the certificate and all registered owners of the certificate must endorse the certificate. *See*, GNMA Guide Appendix IV-3. Similarly, § 306.11 of Appendix XII-3 of the GNMA Guide provides in pertinent part:

> (a)(2) Two or more persons -- general. Securities will not be registered in the name of one person payable on death to another, or in any form which purports to authorize transfer by less than all the persons named in the registration (or all the survivors). Securities will not be registered in the forms "John A. Doe and Mrs. Mary C. Doe, or either of them" or "William C. Doe or Henry J. Doe, or either of them" and securities so assigned will be treated as though the words "or either of them" do not appear in the assignments.

GNMA Guide, Appendix XII-3 at § 306.11 (Footnote omitted). These regulations mandate that the face of the bond identify each actual owner and permits a

transfer of a certificated bond only with the signature of each identified owner.

B. Underlying Factual Overview.

The securities involved in the instant matter are three certificated Ginnie Mae bonds issued by RG bank. The face of these certificates identified the owners as "Salomon Koricki Libezuk or Maida Nussbaum as tenants in common." There is no dispute that the bond certificates identify Mr. Libezuk and Maida Nussbaum as tenants in common. As provided by the regulations the word "or" is ignored and it is clear Ms. Nussbaum was a tenant in common with her brother.[1] As a tenant in common, Ms. Nussbaum held a 50% undivided interest in the certificates.

Mr. Libezuk and Maida Nussbaum were brother and sister. Mr. Libezuk passed away. Iser Koricki Miguelachili, the decedent's son, had himself declared the sole heir to his father's estate and, pursuant to the law of Puerto Rico, claimed 100% ownership of the bonds. While Iser Koricki Miguelachili may be the sole heir of his father's estate, Maida Nussbaum's undivided one-half interest belonged to her and was not part of the brother's estate.

---

[1] *See generally,* Appendix XII-3 § 306.11(a)(2)(i), with regard to registering Ginnie Maes with the right of survivorship. There is no difference between "John A. Doe (123-45-6789) or Mrs. Mary Doe" and John A. Doe (123-45-6789 and Mrs. Mary C. Doe."

Mr. Miguelachili, as sole heir of his father's estate, signed transfer forms to have the bonds reissued solely in his name. Ms. Nussbaum neither requested that her interest in the bonds be transferred to another individual nor executed any document purporting to transfer her interest in the certificates.

Mr. Miguelachili and his mother (who was divorced from his father) filed suit in the local Puerto Rico court. Suit was filed against the financial institutions that issued the bonds, claiming they had improperly made payments to Maida Nussbaum. The defendant financial institutions filed a Third-Party Complaint against Maida Nussbaum, her husband Edward Nussbaum and the Conjugal Partnership comprised by both, who then sought to remove the action to federal court; however, the federal court issued a remand order on the grounds that a third-party defendant cannot remove a case and the matter returned to state court. App 48-54.

Each party filed a Motion for Summary Judgment. With respect to Ms. Nussbaum's interest in the bonds, Ms. Nussbaum argued that federal law applied and that, at a minimum, she was a tenant in common and owned a 50% undivided interest in each security. The other parties argued that the law of Puerto Rico governed the matter. They contended that, irrespective of the manner in which the bond certificates were issued, Puerto Rico law regarding *inter vivos* gifts controlled and, in this instance, the elements of a valid, *inter vivos* gift had not been met. It was their position that under Puerto Rico law, Maida held no interest in any of the bonds.

The trial court issued an order granting partial summary judgment. App 24-47. With respect to matters pertinent to this appeal, the trial court ruled that under Puerto Rico law, a valid *inter vivos* gift of the bonds was not completed therefore Ms. Nussbaum held no ownership in the bonds. App 41-43. As the sole heir of Mr. Salomon Koricki, Iser Koricki was found to be the sole owner of the certificates. App 43.

The Court of First Instance made its ruling final as to the decision that Ms. Nussbaum held no ownership interest in the bonds. App 45. In the court of appeals, the same arguments regarding the applicability of federal as opposed to Puerto Rico law were raised.

The Court of Appeals affirmed the trial court's ruling. App 4-23. While the court acknowledged the supremacy of federal law, it concluded the federal regulations as to titling and registration of certificated Ginnie Mae bonds were inconclusive as to ownership and therefore Puerto Rico law governed. App 15-18. The court further determined that the federal regulations prescribing limitations on the manner in which a certificated bond is transferred were not applicable, as Ms. Nussbaum never held an ownership interest. App 15.

Ms. Nussbaum filed a petition for certiorari to the Supreme Court of Puerto Rico. In its December 11, 2009 order, the Supreme Court of Puerto Rico denied Ms. Nussbaum's petition for certiorari. App. 1-3. This denial left in place the lower courts

decision to improperly allow Puerto Rico law to trump federal law, causing Maida Nussbaum to be divested of her entire ownership interest in the three Ginnie Mae bonds.

REASONS FOR GRANTING THE WRIT

I. THE RULING BY THE LOCAL COURTS OF PUERTO RICO DISREGARDS THE SUPREMACY OF FEDERAL LAW OVER STATE LAW AND CREATES INVESTOR UNCERTAINTY AND LACK OF CONFIDENCE TO THE PROGRAM DESIGNED TO ATTRACT CAPITAL INTO THE NATION'S HOUSING MARKET

Ginnie Maes "are issued by private financial institutions, which are obliged to make timely payment of the principal and interest as set forth in the certificates. The Government National Mortgage Association ("GNMA") guarantees that the payments will be made as scheduled." *See Rockford Life Insurance Co. v. Illinois Dept of Revenue,* 482 U.S. 182, 183 (1987).

The Ginnie Mae market is massive and serves a key economic function. "The purpose of the guarantee and the function of GNMA . . . is to attract investors into the mortgage market by minimizing the risk of loss." *See, id.* at 185. *See, also,* 12 U.S.C. 1716. As Theodore W. Tozer, president of GNMA, recently stated:

> Never before has the need for Ginnie Mae been more apparent. As a result of

> the credit collapse, Ginnie Mae's mortgage-backed securities (MBS) issuance has risen from approximately $6 - $7 billion per month in 2006 to more than $30 billion a month currently. . . . If it weren't for investors' willingness to buy Ginnie Mae securities during the crisis, our nation's housing economy would have suffered far more. . . . For more than 40 years, Ginnie Mae has provided liquidity in times of crisis and ensured a stable secondary market for government insured loans.

Ginnie Mae web site, *Supporting the Expansion of Affordable Housing in America*, Message from the President, at http://www.ginniemae.gov/about/president.asp?Sec=About (last visited May 4, 2010).

To ensure investor confidence in their ownership of the bonds, maintain a liquid and stable secondary market in the bonds and orderly administer its guarantees, GNMA has established regulations regarding the titling of Ginnie Maes. Notwithstanding the *federal* regulations governing the instant Ginnie Maes – and contrary to prior analogous direction from this Court – the courts of Puerto Rico relied on commonwealth law to deprive Maida Nussbaum of her federally guaranteed rights to receive timely payments of principal and interest on her Ginnie Mae bonds. This case presents the narrow, but extremely important, question as to whether Puerto Rico can disregard the supremacy of

federal legislation governing the ownership and transferability of federally regulated and guaranteed instruments in favor of its own laws so as to create instability and investor uncertainty in this key economic market.

At the time the bonds were issued, the certificates identified the owners of the bonds as "Solomon Koricki Libezuk or Maida Nussbaum as Tenants in Common." In its decisions, the Puerto Rico Courts acknowledged there is "no doubt that the name of the appellant [Maida Nussbaum] appears in the three GNMA bonds. . . ." App. 16. Contrary to the federal legislation, the court felt the designation was insufficient to "entitle her to be the owner when her brother died." App. 16. The Court opined that federal regulations "refer mostly to the manner in which [the bonds] will be registered than to the substantive aspects regarding ownership. Similarly, the aspect of registration has the purpose of establishing, for purposes of the Treasury Department, who will be treated as the owner." App. 15. The court then proceeded to rely on Puerto Rico law to fully divest Ms. Nussbaum of any interest in the bonds.[2] *See*, App. 18-20.

Despite there being no dispute that Ms. Nussbaum's name appeared on all three bonds, the court opined there still remained an issue as to her

---

[2] In her claim, Ms. Nussbaum argued that, at a minimum, she owned a fifty percent (50%) undivided interest in the bonds given her status as a tenant in common. Her claim to the right of survivorship was based upon the manner in which Mr. Libezuk's contract with the issuer called for the account to be established, *i.e.*, "Salomon Koricki Libezuk or Maida Nussbaum".

ownership. The court avoided the federal legislation by claiming that ownership of the three certificated bonds was not covered by applicable federal legislation. *See*, App 17-18. The Court's opinion is incorrect. The decision fails to reconcile how an individual can be treated as an owner by Treasury yet not be viewed as the bond owner under state law. The ruling ignores clear federal legislative rules and authority on this precise issue and creates uncertainty and instability in the market for Ginnie Mae securities.

The Court's decision to ignore the titling regulation fails to give effect to the supremacy of valid and applicable Federal law governing the titling of certificated GNMA bonds at the time of issuance. "Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962).

The Puerto Rico Courts' decisions to apply commonwealth law to resolve the issue of ownership results in uncertainty and a decreased confidence in the securities market for this bond. Moreover, this ruling raises the prospect that GNMA will have to exhaustively study the laws of each of the states and territories before it is able to determine the ownership and transferability of these instruments or the party(ies) to whom it owes its guarantee.

This failure is of further significant import given that the goal of the Mortgage Backed Securities program is to attract capital and investment into the nations housing market. The

Puerto Rico Courts refusal to recognize and apply Federal law governing ownership of certificated Ginnie Mae bonds leads to widespread confusion and instability in the GNMA program. The implications of this decision threaten to undermine investors' confidence and willingness to buy Ginnie Mae securities. The Courts refusal to defer commonwealth law imposes a chilling effect on current and future investments given the resulting uncertainty as to the ownership and liquidity of the securities. By promptly resolving this issue, this Court can reassure investors in Ginnie Mae securities of the stability and continuity of the transactions and prevent a surge of unnecessary litigation premised on the vagaries of each state's laws with respect to titling, ownership and transfer.

II. THE LOCAL COURT RULINGS CREATE A CLEAR CONFLICT WITH A PRIOR DECISION BY THIS COURT INTERPRETING THE INTERPLAY BETWEEN STATE AND FEDERAL LAW OF VIRTUALLY IDENTICAL LANGUAGE CONCERNING TREASURY BONDS

This case involves a sharp and financially important departure from this Court's previous interpretation of virtually identical language in other federal legislation applicable to the titling and transfer of bonds. In the instant case, the courts in the Commonwealth of Puerto Rico were called on to resolve a dispute as to the ownership and transferability of three certificated Ginnie Mae Bonds. The issuance, registration, administration and transfer of this type of Ginnie Mae Mortgage-Backed Security are governed by federal legislation.

The decision of the Puerto Rico courts to disregard the federal regulations directly contradicts this Courts assessment of nearly identical regulations concerning the ownership and transferability of Treasury Bonds.[3] In *United States v. Chandler*, 410 U.S. 257 (1973), this Court considered the interplay between state law governing the *inter vivos* transfer of savings bonds and federal regulations applicable to the titling and transferability of such securities.

In *Chandler*, Mrs. Baum, the registered co-owner of several savings bonds, sought to make an *inter vivos* gift of her interest to the other respective co-owners by delivery of the certificates to these individuals. The appellate court affirmed the trial court's decision that the *inter vivos* gift complied with state law and therefore was effective. *Id.* at 257. The evidence reflected that when Mrs. Baum died, "the bonds were still in the original co-ownership form. They had not been redeemed. Neither had they been reissued, as they might have been under the applicable regulations." *Id.* at 258.

In resolving *Chandler*, this Court noted that the applicable regulations required that the "'form of registration used must express the actual ownership of and interest in the bond and . . . will be considered as conclusive of such ownership and interest.'" *Id.* at 259 (quoting 31 CFR § 315.7). The regulations also

---

[3] Note that GNMA adopted the Treasury Department Regulations regarding registration of Ginnie Mae bonds, which have become so important to the health of our housing economy.

"imposed a limitation on transfer: 'Savings Bonds are not transferable . . . except as specifically provided in the regulations. . . .'" *Id.* at 260 (quoting 31 CFR § 315.15). "'No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond. . . .'" *Id.* (quoting 31 CFR § 315.60). The regulations "made the jointly issued bond nontransferable in itself and permitted a change in ownership, so long as both co-owners were alive, only through reissuance at the request of both co-owners." *Id.* at 260. In light of these federal requirements, this Court reversed the lower court decision. *Id.* at 261.

The *Chandler* opinion recognized the applicable regulations were proper enactments authorized by Congress. *Id.* The bonds were issued subject to transfer restrictions. *Id.* "[U]ntil her death, the decedent retained the right to redeem each of the bonds in question, the right to succeed to the proceeds if she survived the putative donee, and the right to join or to veto any attempt to have the bonds reissued." *Id.* In its decision, this Court recognized "that any other rule could well lead to chaotic conditions with respect to savings bonds and to great potential for abuse. Millions of these bonds are outstanding. The requirements of Government for uniformity and for proper recordkeeping alone demand and justify something less than absolute freedom of transfer. Considerations of safety and an aspect of permanency of investment are additional factors that demand the same result." *Id.* at 261-262. The federal regulations "overrode or pre-empted any inconsistent state property law. . . . [A] contrary result would fail 'to give effect to a term or

condition under which a federal bond is issued.'" *Id.* at 262 (quoting *Free v. Bland*, 369 U.S. 663, 669 (1962).

In the instant matter, the Puerto Rico courts, like the lower courts in *Chandler*, failed to give effect to the terms and conditions under which the three Ginnie Mae bonds were issued.[4] Despite recognizing titling and transfer requirements applicable to a certificated Ginnie Mae bond, the Puerto Rico courts disregarded the ownership and transfer limitations incident to these securities. The decisions of the Puerto Rico courts stands in direct conflict with this Court's holding in *Chandler* which construed similar language in the context of savings bonds. As further discussed above, the decision by the Puerto Rico courts could well lead to investor uncertainty and a lack of confidence with respect to a key program designed to attract capital into the housing market.

---

[4] We note that the instant decision apparently conflicts with earlier Puerto Rico decisions recognizing the supremacy of federal regulation. In *Estate of Nakdimen*, 83 P.R.R. 441, 448 (1961) the court recognized that in the context of a treasury bond "this is precisely one of the ways to make a gift intra vivos of this type of obligation, that is, purchasing a bond and directly registering it in the name of the donee, who by virtue thereof, and by operation of the regulations themselves, is acknowledged as owner." Similarly, in *Ex Parte de Jesus*, 68 P.R.R. 646, 653-54 (1948), the court found that in a questin of titling treasury bonds, reliance on certainty of state laws with respect to issuance and sale "would result in in their being given different status in each State of the Union" and "would lead to a great diversity of rules regulating title and redemption."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Arthur M. Schwartzstein
(Counsel of Record)
Arthur M. Schwartzstein, P.C.
1420 Spring Hill Road
Suite 600
McLean, VA 22102-3030
703-749-1282

Jack D. Lapidus
Macleay, Lynch, Gregg & Lynch, P.C.
1629 K Street, N.W.
Suite 802
Washington, DC 20006
202-785-0123

Counsel for Petitioners

No. 09A767

In The Supreme Court of the United States

MAIDA NUSSBAUM, ET VIR,
Petitioners,

V.

ISER KORICKI MIGUELACHULI, ET AL.,
Respondents.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT
OF THE COMMONWEALTH OF PUERTO RICO

APPENDIX

Arthur M. Schwartzstein
(Counsel of Record)
Arthur M. Schwartzstein, P.C.
1420 Spring Hill Road, Suite 600
McLean, Virginia 22102-3030
(703) 749-1282

Jack D. Lapidus
Macleay, Lynch, Gregg & Lynch, P.C.
1629 K Street, N.W., Suite 802
Washington, DC 20006
(202) 785-0123

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

A1

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

KORICKI MIGUELACHULIO,
ISER/RG PREMIER BANK
APPELLEE

VS.

NUSSBAUM, MAIDA A.K.A.
MORICKI, MAIDA ET AL
PETITIONER

CASE: CC-2009-0498 CASE ORI: KICD2006-1449
COLLECTION OF MONIES
CASE CIR: KLAN2008-1945

CIVIL ACTION OR CRIME

VIDAL GAMBARO WINSTON
PO BOX 193673
SAN JUAN PR 00919-3673

NOTICE

I CERTIFY THAT IN RELATION TO THE PETITION FOR CERTIORARI···· THE COURT ISSUED THE RESOLUTION ENCLOSED HEREIN.

GUERRERO CALDERON, JORGE L (ATTY)
COND. GALLARDO BLDG. SUITE 502-
301 RECINTO SUR CORNER TANCA
STREET, SAN JUAN PR 0090-1920

MELLADO VILLARREAL, JAIRO ALFONSO
(ATTY)
SUITE 102. 165 PONCE DE LEON
AVENUE
SAN JUAN PR 00917-1233

SAN JUAN PUERTO RICO DECEMBER 18,
2009

ATTY. AIDA ILEANA OQUENDO GRAULAU
CLERK OF THE SUPREME COURT

S/ILLEGIBLE
EVELYN RAMOS VELILLA
DEPUTY CLERK

AT THE SUPREME COURT OF PUERTO RICO

Iser Korici Miguelachuli and Bertha Miguelachuli Appellee	
RG Premier Bank of Puerto Rico, RG Investments Corporation; RG Mortgage Corporation Defendant-Third Party Plaintiff-Appellees	CC-2009-498
v.	
Maida Nussbaum (A.K.A. Maida Koricki, Edward Nussbaum and the Conjugal Partnership comprised by both Third Party Defendants and Co-Party Defendant-Petitioner	

RESOLUTION

San Juan, Puerto Rico, December 11, 2009.

Having considered the Petition for Certiorari filed by the Petitioner, it is Denied.

So agreed by the Court and certified by the Clerk of the Supreme Court.

s/illegible
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

COMMONWEALTH OF PUERTO RICO
AT THE COURT OF APPEALS
SAN JUAN JUDICIAL REGION
PANEL II

ISER KORICI MIGUELACHULI AND BERTHA MIGUELACHULI Plaintiff-Appellee		Appeal originating from the Court of First Instance San Juan Superior Part
RG PREMIER BANK OF RICO, RG INVESTMENTS CORPORATION, RG MORTGAGE CORPORATION Defendant-Third Party Plaintiff-Appellee	KLAN200801945	Civil No.: KICD2006-1449 (504)
V.		Collection of Monies
MAIDA NUSSBAUM (A.K.A. MAIDA KORICKI, EDWARD NUSSBAUM AND THE CONJUGAL PARTNERSHIP COMPRISED BY BOTH Third Party Defendant and co-party Defendant Appellant		

Panel comprised by its President, Justice García García, Justice Varona Méndez and Justice Cabán García

Varona Méndez, Deciding Judge

JUDGMENT

In San Juan, Puerto Rico, May 14, 2009.

The appellant, Mrs. Maida Nussbaum requested that we review a judgment issued by the Court of First Instance on October 17, 2008, pursuant to which a motion for summary judgment filed by her was dismissed and other motions of summary judgment filed by other parties were granted.

In its judgment, the primary forum concluded that Mr. Iser Koricki Miguelachuli (Mr. Koricki) was the sole titleholder of the personal property object of this controversy, Furthermore, it provided that defendant RG Premier Bank and others (RG) were not liable for the loss of income not earned by the appellant, product of the interests generated by the securities that were not paid to him.

The appellees appeared through their respective briefs in opposition. In view of the grounds that we will discuss hereinafter, the judgment appealed is confirmed.

I.

Mr. Solomon Koricki (deceased) acquired three investment securities from RG, issued on August 15, 2002. These securities were identified as follows: "(a) HUD1714 GNMA Mortgage Pool No. 00449332SN

Cert No. 422995 at 6.5%for the amount of $25,000.00; (b) HUB1714 GNMA Mortgage Pool No. 00538588SN Cert. Nol. 406586 at 6.5%for the amount of $200.00; (c) HUB1714 GNMA Mortgage Pool No. 00553953SN Cert. No. 433978 at 6.5% for the amount of $50,000.00". These totaled the amount of $275,000.00. After the death of the deceased, there arose a controversy before the Court of First Instance regarding the ownership of said securities, the Court made the findings of fact that we narrate hereinafter and issued the judgment herein contested.

Mr. Iser Koricki Miguelachuli (Mr. Koricki) is the only child of the deceased. The appellant is the sister of the deceased. The certificates of the investment securities acquired by the deceased (GNMA) read from their face that they are to the order of *Solomón Koricki Libezuk or Maida Nussbaum as tenants in common*. The appellant does not appear as a signatory to any of the contracts of purchase of investments with RG. She also did not contribute any capital whatsoever for the purchase of the GNMA's. During the life of the deceased, he only collected the interests generated from the GNMA's. The checks arrived by mail to the address of Solomón Koricki. Prior to the death of the deceased, even the checks issued for interests earned by the GNMA's were payable to Salomón Koricki or Maida Nussbaum *as tenants in common*, Mrs. Nussbaum never received any payment whatsoever from RG for said concept. Moreover, during his life the deceased retained possession at all times of the certificates of investment (GNMA's).

In March of 2003 the deceased traveled to the State of Florida in the USA to visit his sister, the appellant. On that occasion he showed the certificates to his sister, but she refused to receive them indicating that the deceased keep them and store them in his safety deposit box. Aside from this action of the deceased, there is no document whatsoever whereby he donates or transfers the certificates pursuant to any other title to the appellant.

The deceased died intestate on May 25, 2003. Some time later, Mr. Koricki was name the sole and universal heir pursuant to Resolution issued by the Court of First Instance on September 19, 2003.[1] After the death of the deceased Mrs. Nussbaum, who was visiting Puerto Rico, took from his apartment two checks related to the GNMA's that had been sent to the postal address of the deceased. The checks were identified as numbers 168155 and 178048, dated May 15 and September 15, 2003, respectively. Each one was for the amount of $1,489.62. Immediately thereafter, Mrs. Nussbaum proceeded to deposit and to cash the aforementioned checks. In turn she requested that the future checks be sent to her pursuant to a request via fax of May 28, 2003. Having made the change requested, RG started to send the checks to Mrs. Nussbaum's address during the years 2003, 2004 and 2005. The checks sent were all for the amount of $1,489.62.

---

[1]Case No. KCJ2003-1608.

In May of 2005, the Department of the Treasury of Puerto Rico issued a Certification of Cancellation of Lien regarding the Estate of the deceased. Having received this certification, RG changed all of the accounts and investment securities of the deceased to the order of Mr. Koricki, including the securities object of this litigation. In view of the above, the appellant did not continue to receive the checks for the GNMA certificates.

Subsequently, Mr. Koricki filed a complaint against RG Premier Bank of Puerto Rico, RG Investment Corporation and RG Mortgage Corporation (RG) where he alleged that the deceased was the sole owner of the investment securities known as GNMA's or Ginnie Maes issued by the defendant, that after the death of the deceased RG issued several monthly payments, for interests, generated by the securities, in favor of the appellant, who appeared as the owner on the face of the GNMA certificates. The plaintiff also claimed from RG the payment of the amounts not received since they were paid to the appellant, as well as the compensation for the damages that the actions of the defendant caused him.

On its part, RG counterclaimed against Mr. Koricki alleging that he had breached his obligations as the sole and universal heir and administrator of the estate of the deceased, since he was aware of the improper collection of the monies and failed to inform it. Furthermore, it filed a third party complaint against the appellant, her husband Mr. Edward Nussbaum and the Conjugal Partnership comprised

by both. It alleged that if Mr. Koricki's complaint was granted, they had to pay the amount for the improper collection. The third party defendants in turn filed a counterclaim against RG, claiming that Mrs. Nussbaum again be certified as the owner of the GNMA's and that the payments for interests on the investment securities again be sent to her. At the same time she requested that the payments that RG had made to Mr. Koricki be substituted.

In view of the respective requests for summary judgment filed by the parties in this case in an individual manner, the sentencing court determined that, in view of the lack of existence of facts in controversy regarding specific issues of the litigation, there was no reason to postpone issuing a partial judgment. It determined that the deceased was the sole owner of the GNMA's, wherefore said securities belonged in their entirety to his sole and universal heir; pursuant thereto it provided that RG had the obligation to pay Mr. Koricki the interests earned by the GNMA's as of the date of the death of the deceased. It also concluded that the appellant did not have and does not have any patrimonial right whatsoever to the investment securities in question. It provided that even though the payments received by the appellant from RG adequately configure the doctrine of improper payment, she has no obligation to reimburse what was improperly received since the payment was made by an error of law committed by RG. As a result of the above, it exempted RG of liability with regard to the appellant. Lastly, the primary forum notified a status hearing to schedule

the continuation of the proceedings, pursuant to what had been resolved, for February 25, 2009 at 9:00 a.m.

Not in agreement with the actions of the Court of First Instance, the appellant resorts to us to indicate the commission of the following errors:

> The Court of First Instance, San Juan Part erred in the application of the law in determining that appellee Iser Koricki was the sole owner of the GNMA's and not Maida Nussbaum.
>
> The Court of First Instance, San Juan Part, erred in exempting the appellee RG of responsibility of responding for the GNMA's to Maida Nussbaum.

II

The appellant sustains in her request for a writ of appeal that the case could not be resolved by summary judgment, since there exists a controversy regarding the ownership of the three Ginnie Mae bonds. Nevertheless, she ignores the fact that she herself requested that summary judgment be issued in her favor, wherefore, by doing so, she admitted that there were no material controversies regarding the facts.

She sustains her questioning of the judgment alleging that, since her name appears on the face of the same as the owner of the aforementioned bonds,

the applicable law is the Federal law, with supremacy over our successoral law. Let us see.

In Puerto Rico, property is considered to be anything that can constitute riches or fortune. Art. 252 of the Civil Code, 31 L.P.R.A., Sec. 1021. Property is divided into real and personal. In what is pertinent to the facts of this case, personal property is, among others, the stocks or interests in banks or commercial companies. Art. 268 of the Civil Code,31 L.P.R.A. sec. 1064. These assets can be the property of one person. The Civil Code defines the term property as a right pursuant to which a thing belongs to one particular person with exclusion of any other. Property grants the right to enjoy and dispose of things without further limitation than those established by law. Art. 280 of the Civil Code, 31 L.P.R.A. sec. 1111. In this manner, it is understood that nobody may be deprived of their property except by a competent authority motivated by just cause. Art. 282 of the Civil Code, 31 L.P.R.A. sec.1114.

As to the securities, these have been defined as "a document referring to a private right, where the exercise of the right is linked to the tenancy itself of the document." Eduardo Vázquez Bote, *Derechos Reales I,* Vol. VII, Ed. 1991, page 40.

On the other hand, the donation in and of itself is an act of mere liberality whereby a person gratuitously disposes of something in favor of another who accepts it. Art. 558 of the Civil Code, 31 L.P.R.A. sec. 1981. Now, however, pursuant to Article 565 of the Civil Code of Puerto Rico, for a donation to be

perfected it is necessary that the donor be aware of the acceptance of the donee. More specifically, the Code establishes that "*the donee must, under penalty of nullification, accept the donation, on his own or through a person authorized through a special power for the case, or with a general or sufficient power.*" Arts. 565 and 572 of the Civil Code, 31 L.P.R.A. §§ 1988 and 2007. The jurisprudence of the Supreme Court ratifies the above by providing that the acceptance of the donation does not have any effect if it is not made during the life of the donor. *Banco Popular de Puerto Rico v. Registrador de la Propiedad*, res. October 30, 2007, 2007 TSPR 190.

In the particular case of personal property, it is stated that donations among living persons can be made verbally provided the donation, the delivery and the acceptance are simultaneous. If these efforts are not carried out simultaneously, for the donation to be valid at the least it has to be made in writing and accepted in writing. Dr. Ruth E. Ortega Vélez, *Donaciones, Herencias y Testamentos*, Ediciones Scisco, 1st Ed. (2000), page 30.

In a case with facts analogous to this one, the Supreme Court was forced to determine the ownership of a bank account, which appeared registered in the name of two persons, to resolve the controversy. To that effect it conducted a factual analysis using the following criteria: (1) the true intention of the parties in opening the account; (2) the terminology of the deposit account or the pre-printed card provided by the Bank, which contains the agreement; (3) the relationship of the parties; (4) The

use and management of the funds during the life of the deceased; (5) if there occurred a delivery of what was donated, even if it were symbolic; (6) if the depositors were fully aware of the legal effects entailed by maintaining a joint savings account; (7) if there was any particular reason for opening the account; and (8) if the deceased depositor made provisions through a testament for the funds in the joint savings account. *Lugo v. Central Federal Savings and Loan Association, 108 D.P.R. 72 (1978).*

III.

The appellant states that according to applicable federal regulations, and pursuant to the doctrine established in *Ex Parte de Jesús*, 68 D.P.R. 697 (1948), "being the existing loan agreement between the purchaser of the U.S. Savings Bonds and the Government of the United States a federal one governed by the law, federal regulations, and being the same in turn the supreme law of the country by constitutional provision, any state law while it is in conflict with said law or federal regulation is subordinated to what is provided by the same."

The case of *Ex Parte de Jesús, supra,* involved bonds issued by the Government of the United States. In said case, a matrimony acquired the bonds while married and when one of the spouses died, the Supreme Court of Puerto Rico determined that when a co-owner dies, it belongs to the surviving co-owner, without there corresponding any interest whatsoever to the estate of the deceased, since it involved a contract, according to federal regulations. Now.

however, in that case, the supreme forum stated that "since the indicated regulation clearly states that when a co-owner dies the other will be considered the sole and absolute owner, we have to conclude, in harmony with these authorities and with the regulations, that the bonds herein involved are the exclusive property of the petitioner Luisa de Jesús López". Said standard was reiterated in *Veve v. Srio. de Hacienda,* 78 D.P.R. 731 (1955). Similarly in *Barrios v. Sucn. Manzano,* 79 D.P.R. 950 (1957), the Supreme Court clarified and added the following to the standard established in *Barrios, supra,* in a controversy also related to bonds issued by the Government of the U.S.A.: "(w)e now add that pursuant to the provisions of sec. 315.47 of said regulation, when the owner of a bond dies, without being survived by a co-owner or a designated beneficiary, it is considered that the bond belongs to the estate of the deceased owner and it is payable to his heirs."

GNMA's are investment securities guaranteed by the *Government National Mortgage Association* (Association). As sustained by the appellant, when issuing the GNMA bonds, RG is bound by the agreement with the Association and is obligated to comply with applicable federal statutes and with the regulations and rules that govern the issuance and administration of the GNMA bonds, 24 C.F.R. 330.50. She sustains that the Guidelines of GNMA govern the ownership of the bonds and that a registration procedure is established to state the true ownership of the security, pursuant to which, Maida Nussbaum, the appellant, was identified as the owner.

The appellant also argues that the proprietary interest of a GNMA bond cannot be transferred, unless the established procedure is fulfilled, which requires submitting Form 1832 which authorizes its negotiability. Since she is a holder of securities on record, she cannot be dispossessed of her interest without a document of transfer with her signature.

Certainly, we concur with the appellant, with regard to the rule that grants supremacy to the federal legislation. Nevertheless, pursuant to the regulatory provisions cited by her, we are not convinced that there is a situation in the regulation that contemplates or governs the situation before us. Specifically, the existence or lack of existence of a Form 1832 has no pertinence to the case before our consideration, because the ownership of the bonds and not their negotiability is at issue here.

As to the requirements to register a bond, they refer mostly to the manner in which they will be registered than to the substantive aspects regarding ownership. Similarly, the aspect of registration has the purpose of establishing, for purposes of the Treasury Department, who will be treated as the owner.[2] Appendix XII-3, *United States Treasury Department, General Regulations with Respect to United States Securities,* Department Circular No. 300, Fourth Revision, Subpart B, Registration, GINNIE MAE 5500.3, Rev. 1, 1/1/06.

---

[2] Sec. 306.10... The Treasury Department reserves the right to treat the registration as conclusion of ownership ...

In this case there is no doubt that the name of the appellant appears in the three GNMA bonds that the deceased acquired. However, pursuant to the same rules presented by the appellant, there arise doubts with regard to her argument that the fact that her name appears on the bonds entitle her to be the owner when her brother died. According to the same Federal guidelines submitted by the appellant in her appendix, the deceased in this case did not use the form to register a person entitled to acquire the bond at the time of death. Sec. 306.11(a)(2)(i) (*With right of survivorship*[3]). Among the examples included in the guidelines are the following:

> John A. Doe (123-45-6789) or Mrs. Mary C. Doe or the survivor.
>
> John A. Doe (123-34-5678) or Mrs. Marcy C. Doe or Miss Mary Ann Doe or the survivors or survivor.
>
> John A. Doe (123-45-6789) or Mrs. Mary C. Doe.

---

[3] According to Black's Law Dictionary, *survivorship* is defined as "the living of one of two or more persons after the death of the others. Survivorship is where a person is entitled to property by reason of his having survived another person who had an interest in it. v. Jacobs, 306 U.S. 363, 59 S. Ct. 551, 555. A feature of joint tenancy and tenancy by the entirety, whereby the surviving co-owners takes the entire interest in preference of heirs or devisees of the deceased co-owner. Black's Law Dictionary, Centennial Edition, West Publishing Co., 1990, p. 1446.

In the case before our consideration, the manner in which the deceased included the name of the appellant in registering the bonds was the following:

> Salomón Koricky Libezuk or Maida Nussbaum as tenants in common.[4]

The manner chosen by the deceased to register said bonds coincides mostly with the manner established in the guidelines to record owners *without right to ownership as of the date of the death of the co-owner*. This being so, then in accordance to Section section (sic) 306.11 (a)(2)(i) of the Guidelines cited, the manner to record in said cases (*without right of survivorship)* is the following:

> John A. Doe (123-45-6789) and William B. Doe as tenants in common.

In light of the above, we have not found a federal rule that provides specifically, based on the rule established in *Ex Parte de Jesús*, the controversy of facts before our consideration, wherefore the

---

[4]According to Black's Law Dictionary, the term "tenants in common" means: A form of ownership whereby each tenant (i.e., owner) holds an undivided interest in property. Unlike a joint tenancy or a tenancy by the entirety, the interest of a tenant in common does not terminate upon his or her prior death (i.e., there is no right of survivorship). Assume, for example, that B and C acquire real estate as equal tenants in common, each having furnished one half of the purchase price. Upon B's prior death, his one-half interest in the property passes to his estate or heirs. Black's Law Dictionary, supra, pp. 1465-1466.

doctrine established in this case is not applicable. Pursuant thereto, we must attend the case based on what is provided in our laws. Hereinafter we make the analysis of the errors stated jointly, since they are closely linked.

As it appears from the facts stated in the appellate record, the deceased acquired certain investment securities. Even though from the face of the securities there appears the phrase *Salomón Koricki Libezuk or Maida Nussbaum as Tenants in Common* the same were acquired solely with the money of the deceased. The appellant did not contribute any monetary amount, nor did she have to sign any document whatsoever to perfect the acquisition of the GNMAs. As stated by the instant forum, the above manifests the apparent intention of the deceased to make an *inter vivos* donation in favor of the appellant.

Nevertheless, pursuant to current law, for an *inter vivos* donation to be perfected it is necessary that a series of requirements occur. One of these *sine qua non* requirements is that there be an acceptance by the donee.

As appears from the partial judgment herein contested, the GNMAs object of this litigation are catalogued by our Civil Code as personal property. Art. 268 of the Civil Code, *supra*. Therefore, the actions of the deceased of acquiring certain securities in his name and that of the appellant configured the intention of making an *inter vivos* donation. Taking this into account, it should be pointed out that

pursuant to the law in effect, for this donation to be perfected there had to occur the delivery and the acceptance of the securities from the deceased to the appellant. Art. 565 of the Civil Code, *supra*. The Supreme Court has been even more emphatic with this requirement in requesting that said acceptance be made during the life of the deceased. See, *Banco Popular de Puerto Rico v. Registrador de la Propiedad, supra*.

In this case, after acquiring the GNMAs, the deceased visited his sister and showed her the same with the apparent purpose that she maintain them in her possession. She, instead of accepting the donation which at that moment her brother intended to make, refused to receive the documents related to the investment securities and asked the deceased to keep them in his safety deposit box. From these facts it clearly appears that during the life of the deceased the requirement of "acceptance by the donee" never occurred. Therefore, the donation which at that time the deceased intended to make to her was never configured. The actions of the appellant, subsequent to the death of the deceased, of taking possession of the certificates of the GNMA bond and changing the address to where the payments generated for their interests were issued, had no effect whatsoever. Since their acceptance, as we have already mentioned, should have occurred during the life of the deceased.

Since the *inter vivos* donation was not perfected, as it appears to have been the intention of the deceased, the certificates of securities of the GNMA

bonds continued to be part of his patrimony in their entirety. Subsequently the deceased died intestate. Absent a valid *mortis causa or inter vivos* donation, it was correct to declare Mr. Koricki as the sole and universal heir of the estate of the deceased. Thus, the property of the GNMA certificates had to be awarded to him in their entirety and not in part as the appellant pretends. The direct result of the analysis made herein and of the determination of the Court of First Instance is that the appellant is not entitled to the GNMA bonds and never was, since she never accepted the donation that the deceased intended to make to her in life. Furthermore, if we examine the particular facts of this case in light of the criteria established by the Supreme Court in *Lage v. Central Federal Savings and Loan Association, supra,* we notice that the result regarding the ownership of the GNMA bonds continues to be the same.

Pursuant to the above, RG is not responsible to the appellant insofar as the securities object of this case are concerned. Pursuant to the above, it is pertinent that we confirm the partial judgment issued by the instant forum in its entirety.

VI

In view of what has been previously discussed, the partial judgment appealed is confirmed.

So agreed and ordered by the Court and certified by the Clerk.

s/illegible
MILDRED IVONNE RODRIGUEZ RIVERA
DEPUTY CLERK OF THE COURT OF APPEALS
Dimarie Alicea Lozada
Clerk of the Court of Appeals

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN PART

KORICKI MGUELACHULI, ISER
PLAINTIFF
VS.
RG PREMIER BANK OF PR
DEFENDANT

CASE: KICD2006-1449
ROOM: 0504

COLLECTION OF MONIES
COLLECTION OF MONIES
CAUSE/CRIME

ATTY. VIDAL GAMBARO WINSTON
PO BOX 193673
SAN JUAN PR 00919-3673

NOTIFICATION OF JUDGMENT

THE UNDERSIGNED CLERK NOTIFIES YOU THAT THIS COURT HAS ISSUED JUDGMENT IN THE ABOVE CAPTIONED CASE ON THE 17TH OF OCTOBER OF 2008, WHICH HAS BEEN DULY RECORDED AND FILED IN THE RECORD OF THIS CASE, FROM WHICH YOU MAY FIND OUT IN DETAIL THE TERMS OF THE SAME.

AND SINCE YOU ARE OR REPRESENT THE PARTY AFFECTED BY THE JUDGMENT, WITH REGARD TO WHICH AN APPEAL MAY BE FILED, I ADDRESS THIS NOTICE TO YOU, HAVING FILED A COPY OF THE SAME IN THE RECORD ON NOVEMBER 07, 2008.

GUERRERO CALDERON JORGE L
GALLARDO COND SUITE 502 301 RECINTO SUR ST
SAN JUAN PR 00901-1920

MELLADO VILLAREAL JAIME ALFONSO
165 PONCE DE LEON AVE SUITE 101
SAN JUAN PR 00917-1233

SAN JUAN, PUERTO RICO, NOVEMBER 07, 2008.

GRISELDA RODRIGUEZ COLLADO, ACTING CLERK
s/illegible
BY: ERAZO CRUZ WILNELIA
DEPUTY CLERK

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN SUPERIOR PART

ISER KORICKI MIGUELACHULI AND BERTHA MIGUELACHULI PLAINTIFF v. RG PREMIER BANK OF PUERTO RICO, RG INVESTMENT CORPORATION, RG MORTGAGE CORPORATION DEFENDANT-THIRD PARTY PLAINTIFF v. MAIDA NUSSBAUM (A.M.A: MAIDA KORICKI); EDWARD NUSSBAUM AND THE CONJUGAL PARTNERSHIP COMPRISED BY BOTH THIRD PARTY DEFENDANTS AND CO-PARTY DEFENDANT	CIVIL NO.: KICD 2006-1449 Room (504) RE: COLLECTION OF MONIES

PARTIAL JUDGMENT

Iser Koricki Miguelachuli filed a complaint against RG Premier Bank of Puerto Rico, RG Investment Corporation and RG Mortgage Corporation (hereinafter RG). In the same he alleged that his deceased father, Salomon Koricki, was the sole owner of several investment securities known as GNMA's or GinnieMaes issued by the defendant. He further alleged that after the death of his father RG sent several monthly payments for interests generated by these securities to Maida Nussbaum (a.k.a. Maida Koricki), sister of Salomon Koricki, who appeared as the co-owner on the face of the GNMA certificates. Plaintiff also claimed from RG the payment of the amounts he did not receive and which were paid to Mrs. Nussbaum and also the compensation of the damages that the actions of the Defendant had caused him.

RG filed a counterclaim against Iser Koricki alleging that he failed to fulfill his obligations as the universal heir and administrator of the estate of his deceased father, because he was aware of the improper collection by Mrs. Maida Nussbaum and failed to immediately notify the financial institution of this fact.

RG also filed a third party complaint against Mrs. Maida Nussbaum collecting the improper payment from her, in the event this Court issues a resolutions in Plaintiff's favor.

Mrs. Nussbaum in turn filed a counterclaim against RG requesting that she be certified as the titleholder of the GNMA's and that the payments for interests of the investment securities again be sent to her. She also requested that RG reimburse the payments that RG made to Iser Koricki.

The three parties involved in this case have individually requested that summary judgment be issued. Having evaluated the motions, the evidence that is attached thereto, and the entire record we find that there is no reason to postpone issuing judgment over several of the claims, up until the complete resolution of the case.

Hereinafter we present the finding of uncontested facts that arise from the record and which are relevant to adjudicate the controversies which we are resolving today.

UNCONTESTED FACTS MATERIAL TO THE CONTROVERSY

1. Salomon Koricki acquired the following investment securities from RG:

a) HUD1714 GNMA Mortgage Pool No. 00449332SN Cert. No. 422995 at 6.5% for the amount of $25,000.00 – Date of issuance: 15th of August of 2002;

b) HUD1714 GNMA Mortgage Pool No. 00528588SN Cert. No. 406586 at 6.5% for the

amount of $200,000.00 – Date of issuance: 15th of August of 2002;

c) HUD1714 GNMA Mortgage Pool No. 0053953SN Cert. No. 422978 at 6.5% for the amount of $50,000 – Date of issuance: 15th of August of 2002.

2. Iser Koricki Miguelachuli is the only child of Salomon Koricki.

3. Maida Nussbaum is Salomon Koricki's sister.

4. The certificates of the investment securities (GNMA's) indicate on their face that they are to the order of: *SALOMON KORICKI LIBEZUK OR MAIDA NUSSBAUM AS TENANTS IN COMMON.*

5. During the life of Salomon Koricki, only he collected the interests generated by the GNMA's.

6. The checks arrived by mail at the address of Salomon Koricki.

7. Prior to the death of Salomon Koricki, Maida Nussbaum never received any payment whatsoever from RG.

8. The checks issued by RG for interests earned by the GNMA's were payable to *Salomon Koricki or Maida Nussbaum as tenants in common.*

9. Maida Nussbaum did not contribute any capital whatsoever for the purchase of the GNMA's.

10. Maida Nussbaum does not appear as a signatory in any purchase agreement with RG.

11. When Salomon Koricki purchased the GNMA's, he always retained possession of the same.

12. On March 2003 Salomon Koricki traveled to the State of Florida, USA, to visit his sister, Maida Nussbaum. On that occasion he showed the certificates to his sister. (This fact *was admitted by the third party defendant on pages 64 to 70 of the Deposition of Mrs. Maida Nussbaum taken on November 9, 2007 in Miami, Florida*).

13. When Salomon Koricki showed the certificates to Maida Nussbaum in March 2003, she refused to receive them and pointed out to him that he should keep them and store them in his safety deposit box. (*Fact admitted by the third party defendant on pages 62 to 71 of the deposition of Mrs. Maida Nussbaum on November 9, 2007 in Miami, Florida*).

14. Maida Nussbaum never had possession of the GNMA certificates.

15. There is no written document whatsoever donating the certificates to Maida Nussbaum or transferring the certificates to her by virtue of any other transaction.

16. Salomon Koricki died intestate on May 25, 2003.

17. Iser Koricki was declared the sole and universal heir of Salomon Koricki pursuant to Resolution of Superior Court Judge Awilda Irizarry of September 9, 2003 in case KJV2003-1608 before this Court.

18. After Salomon's, Maida Nussbaum took from the apartment of the deceased two checks related to the GNMA's which were sent to the postal address of Salomon Koricki. These checks are: 1) Check No. 168155 dated May 15, 2003; and 2) check No. 178048 dated September 15, 2003. Both checks were in the amount of One Thousand Four Hundred Eighty Nine and Sixty Two Cents ($1,489.62).

19. Maida Nussbaum endorsed and cashed or deposited the aforementioned checks.

20. After the death of Salomon Koricki, Maida Nussbaum requested that RG send the checks for the interests of the GNMA's directly to her, pursuant to a request sent via fax on May 28, 2003.

21. After the request of change of address made by Maida Nussbaum, RG sent several checks to her address in the state of Florida.

These checks are listed below:

Check Number	Date	Amount
179918	10-15-2003	$1,489.62
181639	11-15-2003	$1,489.62
183384	12-15-2003	$1,489.62
185005	1-15-2004	$1,489.62
186634	2-15-2004	$1,489.62
188143	3-15-2004	$1,489.62
189673	4-15-2004	$1,489.62
191321	5-15-2004	$1,489.62
192854	6-15-2004	$1,489.62
194693	7-15-2004	$1,489.62
196151	8-15-2004	$1,489.62
197507	9-15-2004	$1,489.62
198887	10-15-2004	$1,489.62
200168	11-15-2004	$1,489.62
201426	12-15-2004	$1,489.62
202657	1-15-2005	$1,489.62
203895	2-15-2005	$1,489.62
205047	3-15-2005	$1,489.62
206213	4-15-2005	$1,489.62
207387	5-15-2005	$1,489.62
208436	6-15-2005	$1,489.62

22. On May 17, 2005 the Puerto Rico Treasury Department issued a Certification of Cancellation of Lien

regarding the Estate of Salomon Koricki.

23. After having received this Certification together with the Resolution regarding the Declaration of Heirs, RG changed all of the accounts and investment securities of Salomon Koricki to the name of the Plaintiff.

24. Maida Nussbaum received the last check from RG for the interests on the GNMA's on June 2005.

APPLICABLE LAW

GNMA's are investment securities guaranteed by the *Government National Mortgage Association* (GNMA). These types of securities are personal property pursuant to the provisions of our Civil Code. See Article 268 of the Civil Code, 31 LPRA Sec. 1064; *Fuentes v. Fulano de Tal*, 84 DPR 506 (1962); and *Dávila v. Registrador*, 59 DPR 130 (1941).

These securities, as every personal property, are subject to acquisition pursuant to a legal transaction with the issuer. The issuer has the responsibility to record the acquisition of an investment security backed by the guarantee of the GNMA and issue a certificate stating the owner of the right on such investment security. Thus, the United States Treasury Department established that "*[t]he registration used must express the actual*

ownership of a security..." Department Circular No. 300 – 4th Rev., Subpart B-Registration, *GinnieMae, Mortgage-backed Securities Guide: United States Treasury Department, App. XII-3, Sec. 306.10, GinnieMae 500.3 Rev. 1.*

Our legal framework allows that any property belong to a single owner or to several through community. The aforecited Federal regulations establish the methods in which to register the certificates when a community exists between two or more natural or juridical owners. These rules divide the community of two or more owners of GNMA's into two categories: the community in which the members of the community have the right of survivorship and one which does not include such right. In the one pertaining herein, it must be pointed out that when the certificate is registered in the name of two or more persons with a right of survivorship, the preposition *OR* be used between the names of the members of the community. When this right is not granted, the preposition *OR* is used between the names of the members of the community followed by the phrase "as tenants in common".

Article 280 of the Civil Code provides that property is the right pursuant to which something belongs to a particular person with the exclusion of all others. 31 L.P.R.A. §1111. Nevertheless, Article 326 of the Civil Code, 31 L.P.R.A. § 1271, establishes that there may be multiple persons in the property, when it provides that "[t]here is a community when the property of something or of a right belongs *pro*

indiviso to several persons. There being no contract or special provisions, the community shall be governed by this title."

The term *"as tenants in common"* establishes a specific type of community.[1] The definition coincides with the Germanic community described by the doctrine. The Germanic community or the community of property in common hands is that in which the members of the community have a participation which cannot be stated in quotas. The property is wholly owned by all of the members of the community. Contrary to the community of ordinary or roman property, in common hands each member of the community is the owner of everything without a special denomination of quotas. José Ramón Vélez Torres, *Curso de Derecho Civil*, Volume II, Interamercian University of Puerto Rico, 2002, Page 145; See also, *International Charter v. Registrador*, 110 D.P.R. 862 (1981).

Thus, all of the members of the community are titleholders of the entire property. This title is obtained through an onerous or gratuitous cause. Velez Torres, idem., on page 252. When the property is acquired through an onerous cause, there exists a displacement of patrimony from the person who acquires to the person who it is assigned.

[1] Blacks Law Dictionary defines the term "Tenancy in Common" as follows:

> *Where property is held by several and distinct titles by unity of possession, neither knowing his own severally, and therefore they all occupy promiscuously,* Blacks Law Dictionary, 4th Ed. Rev., 1968.

The gratuitous mode allows the person who assigns the right or property to do so by mere graciousness. A donation is an act of graciousness (*animus donandi*) pursuant to which a person (donor) gratuitously disposes of something by removing it from its patrimony and passing it to another who accepts it. (donee). Article 558 of the Civil Code, 31 L.P.R.A. § 1981.

The Civil Code of Puerto Rico recognizes that donations may be made *inter vivos* or *mortis causa*. Article 559 of the Civil Code, 31 LPRA § 1982. The latter follows the rules of testate succession. Article 562 of the Civil Code, 31 LPRA § 1985. They must be interpreted as bequests, since they take effect upon the death of the donor. See *Lange v. Central Federal Savings*, 108 D.P.R. 72 (1978).

A medullar characteristic that differentiates the *inter vivos* donation from the *mortis causa* one is the irrevocability of the act. That is, that the donation cannot be set aside by the sole will of the donor. Id. at page 84. "The revocability or irrevocability of the act is, without any doubt, the essential nature that distinguishes dispositions between *inter vivos* from dispositions that are *mortis causa*, whether or not they are called donations, without the fact of establishing the death of the disposer as a term or condition being able to alter its true nature". Id. citing Manresa, *Código Civil Español*, Volume 5, 122-280 (1972).

On the other hand, *inter vivos* donations shall be governed by the provisions of the obligations and the

contracts with regard to every aspect that is not specifically comprised in the Civil Code. Art. 563 of the Civil Code, 31 L.P.R.A. § 1986. The *inter vivos* donations may occur in three forms: purely gracious donations, onerous donation and the remunerative donation. Art. 560 of the Civil Code, 31 LPRA § 1983.

The donation of personal property, on its part, is governed by Article 574 of the Civil Code, 31 L.P.R.A. § 2009. There it is indicated that it may be carried out verbally or in writing. "The verbal [donation] requires the simultaneous delivery of the property that is donated. Lacking this requirement it will have no effect whatsoever if it is not made in writing and the acceptance is also stated in writing". Id. The acceptance of the donation of a personal property is an indispensable requirement for the same to be effective. *Ex parte, González Muñiz,* 128 D.P.R. 565 (1991). "The donor should, under penalty of nullification, accept on his own or through a person authorized with a special power of attorney for the case, or with a sufficient and general power of attorney" Art. 572 of the Civil Code, 31 L.P.R.A. § 2007.

In Abintestato Nakdimen, 83 D.P.R. 459 (1961), the Supreme Court expressly resolved that the rights of the parties to the product of a United States savings bond and postal savings certificates may be object of a donation and shall be governed by the laws in effect of our jurisdiction. In *Nakdimen,* the Court declared the donation of federal bonds in effect when the donor sent them by mail to the donee and this latter received them. Emphasis was given to

two aspects: first, the effective delivery of the property donated (the bonds); and second, the statements of the donor.

In the first letter of Mr. Nakdimen the bonds were included and he stated that "everything should be yours should anything happen to me". The Supreme Court emphasized that this language was not sufficient to execute the donation since it conditioned the same to the death of the donor, which would make it a *mortis causa* donation and it required the formalities of the testamentary of the estate. Id. at page. 465. Nevertheless, in a second letter the phraseology changed when the donor stated that "I want the bonds to be yours because I won't last long". This statement, in the opinion of our highest forum, eliminated the condition death that prevailed in the first and perfected the *inter vivos* donation. Id. at page. 470.

Almost 20 years later the Supreme Court addressed again the issue of *inter vivos* or *mortis causa* donations in a factual situation which is similar to the one at hand. In *Central Federal Savings, supra,* an uncle opened a savings account identified as being for tenants in common and right of survivorship, making his niece appear as co-owner. She signed the testamentary cards and returned them to her uncle so he could keep them. Only the uncle only deposited funds in the account, and it was he who kept the savings book and other documents. Two years later the uncle died intestate.

The Supreme Court resolved that there was no donation. It stated that the terms contained in the agreement with regard to the contractual relationship that established a relationship of joint ownership with right of survivorship were not determinant. It also stated that the express contractual manifestation to the effect that '...the undersigned agree amongst themselves and with you that all of the funds deposited or aggregated to the account by any of the parties are and will be considered a donation and transfer to the other parties...".[2]

The Supreme Court based its decision on the testator's intention that should he die the funds would pass to his niece. "The intention... was to donate that money to the appellant at the time of his death, what we have previously identified as a *mortis causa* donation." Id. at page 86. Immediately thereafter, the Supreme Court stated another basis for its decision indicating that even excluding the testimony regarding the uncle's intention, and taking into account solely the previously cited contract, the donation was not perfected. The opinion that supports this conclusion states the following:

> "Although he [the uncle] donated the monies deposited and any others [funds] that he deposited in the future and designated her as the co-owner of

[2] Savings account agreement cited by the Supreme Court in *Lage v. Federal Savings, ante*. At page 86.

> the same, said manifestation of his will, regardless of its having been accepted by the appellant, it did not *per se* juridically qualify the act as an *inter vivos* donation, since when he reserved the faculty to unilaterally withdraw the entire amount he reserved in life a power of full disposition which indicated and demonstrated that it was not a detachment of the *88 irrevocable patrimony. In short: in strict law the donation, in life, never materialized and it was also null. The terms of the contract that was signed and the circumstances involved in the same do fail to fall within the mold of the Civil Code corresponding to an *inter vivos* donation by evidencing a permanency in the control and free disposition of the account by the donor herein, and a desire to not lose it during his life. Its qualification corresponds to a donation that is conditioned to the death of the disposer, for whose validity it was necessary that it contain the formalities of a testament." *Lage v. Central Federal Savings, ante* at page 87-88 (1961).

The lack of understanding of these civil rules may give rise to the transfer of patrimonies in an illegal or improper manner. In some instances it may provoke the payment of funds to whom is not entitled to receive it, giving rise to the figure of improper payment or collection.

"When something is received when there was no right to collect the same, and it has been improperly delivered by error, there arises the obligation of restitution." Article 1765 of the Civil Code, 31 L.P.R.A. § 5121. The doctrine of improper collection has three fundamental elements: (1) that a payment occur with the intention of extinguishing an obligation; (2) that the payment made have no just cause; and (3) that the payment has been made by error and not by mere graciousness or due to any other concept. *Sepúlveda Rivas v. Departamento de Salud*, 145 D.P.R. 560, 566-567 (1998). The concept of payment without just cause represents a payment made with an equivocal or erroneous cause. *Sucn. Choisne v. Municipio*, 100 D.P.R. 501 (1972). On the other hand, only the person who paid pursuant to an error of fact but not of law is entitled to recover what was paid. Id.

An error of law is one incurred by someone who does not adhere to what is provided by a juridical standard. "In the context of an improper collection, an error of law is committed by whoever makes a payment in the belief that it is requireable to it pursuant to law, either due to lack of knowledge of the rule that relieves it of the payment, or due to an erroneous application of the applicable law." *Sepúlveda Rivas v. Departamento de Salud, ante*, at page 568. When the true facts are before a person and an improper payment is made pursuant to an evaluation of the situation and an erroneous interpretation of the rights of the parties, we are before an error of law. See *Cartagena v. ELA*, 116 D.P.R. 254 (1985).

On its part, the error of fact refers to whoever acts based on facts that are not the correct ones or, even having the correct facts at hand, commits a processing or a merely formal error, which is popularly designated as a human error. *Sepúlveda Rios v. Departamento de Salud. Id.*

APPLICATION OF THE LAW TO THE CONTROVERSY

Prior to his death, Mr. Solomon Koricki invested in certain securities issued by RG and guaranteed by GNMA. The face of the certificates reads that they are payable to the order of *Salomon Koricki Libezuk or Maida Nussbaum as tenants in common.* The third party defendant alleges that this inscription was erroneous since it was her brother's desire that the securities be certified as being to the order of *Salomon Koricki Libezuk or Maida Nussbaum.* Even though such difference may have legal considerations, for the controversy that we must resolve it is irrelevant for reasons that we will hereinafter.

A community of assets exists under both classifications. We are aware that Salomon's title arises from the patrimonial displacement that he made in favor of RG and therefore it is onerous. Maida Nussbaum, on her part, accepts that she did not contribute anything for the purchase of the same. Her participation in the community arises pursuant to Salomon's graciousness by including her as co-owner of the rights acquired by him. This

apparent displacement attempted to perfect a donation.

As we previously mentioned, donations may occur *inter vivos* or *mortis causa*. Nevertheless, in the present case none was perfected. Let us see why.

Even if the parties failed to clearly establish it, the phrase "tenants in common" on the GNMA certificates publishes the co-ownership of the investment security through a Germanic community. As we have mentioned, in this community all of the members of the community are owners of the entire property at all times, even if it is pursuant to different titles. We also said that Mr. Salomon Koricki became the owner of the certificates pursuant to the onerous purchase and sale and attempted to make Mrs. Maida Nussbaum an owner pursuant to a gracious title through a donation. Had it been Mr. Koricki's intention to donate the certificate as ofthe moment of the purchase of the securities we would have to evaluate his actions in light of the figure of an *inter vivos* donation.

The Civil Code is clear in establishing that donations of personal property may be made verbally or in writing. If in writing, the acceptance of the donation must be made in the same manner. Should it be made verbally, it requires the simultaneous delivery of the item donated. There is no evidence before us of any document written by Salomon Koricki that declares his intention to donate the certificates to Mrs. Nussbaum. Even granting that the certificate in the name of both is a sufficient

document to express such an intention, it is still missing the complement of Mrs. Nussbaum's written acceptance. We have yet to consider if such an *inter vivos* donation was made verbally.

From the evidence submitted by the parties, it appears as an uncontested fact that Mr. Koricki visited his sister after purchasing the securities and with them in his possession. It also appears that Mr. Koricki showed the certificates to his sister in what she understood was a manifestation of the desire of the deceased that they were for her.[3] Mrs. Nussbaum requested that her brother remain in possession of the certificates and that he keep them in his safety deposit box. The delivery to her never occurred. The acceptance never occurred. The *inter vivos* donation was never perfected.

On the other hand, and as it appears from the motions and the case file, Mrs. Nussbaum's position is that her brother purchased the GNMA's with the intention that they be for her when he died[4]. This testimony is in harmony with her allegation that it was Mr. Salomon Koricki's desire that the certificates not include the phrase *as tenants in common,* thus granting her the right of survivorship.

---

[3] This clearly arises from pages 62-71 of the Deposition of Mrs Maida Nussbaum on November 9, 2007, in Miami, Florida. This Deposition was attached as an Exhibit to the *Motion for Summary Judgment of RG Requesting the Dismissal of the Counterclaim Filed by the Third Party Defendants*, filed on January 22, 2008 and to the *Reply* filed by Nussbaum on March 26, 2008.

[4] This also arises from the Deposition of Mrs. Maida Nussbaum of November 9, 2007.

The factual framework in this case reveals an intent of a *mortis causa* donation, since the donation was never perfected. Salomon Koricki made certain expressions of what was his desire "mortis causa" but failed to comply with the formalities of a donation.

Pursuant to the previously discussed doctrine, in order to perfect a donation which establishes the death of the donor as a condition, it is necessary to comply with the formalities and solemnities of a testated estate and Mr. Koricki died intestate.

There is no doubt that the deceased, Salomon Koricki, was the sole owner of the GNMA's. Consequently, the plaintiff Iser Koricki, his sole and universal heir, absent a valid *mortis causa* donation, is the sole owner of the certificates pursuant to the successorial rights that protects the same.

Therefore, RG must pay the plaintiff, Iser Koricki the interests generated by the GNMA's identified above in this Partial Judgment as of the date of the death of his father, Salomón Koricki. The checks listed above should have been issued in favor of Mr. Iser Koricki and not of Maida Nussbaum, who did not even have a patrimonial right to the investment securities in controversy.

On the other hand, the checks sent by RG to Maida Nussbaum after the death of Salomon Koricki constitute an improper payment. RG made payments to extinguish the obligation that arose from the issuance of the certificates; sent them to a

person who had no right to collect them; and they were not made by mere liberality but by error. Having fulfilled the requirements to configure an improper payment we now have to determine if Maida Nussbaum must return what she received. What has been improperly collected must be returned provided the error which originated the payment was an error of fact and not of law.

Having examined the file we find that RG had before it the truth of all of the facts. It was aware of the purchase of the securities; it knew that the certificates were payable to the brothers as tenants in common; it knew or should have known that such categorization deprived the members of the community of the right of survivorship and it was aware of the death of Mr. Koricki. Before these certain facts RG erroneously interpreted the rights of the parties and sent the payments to the address indicated by Maida Nussbaum, thus incurring in an error of law. This being the case it is not warranted that Maida Nussbaum return the amounts disbursed by RG.

PURSUANT TO WHAT IS STATED ABOVE, the Motion for Summary Judgment filed by the third party defendant Maida Nussbaum on October 19, 2007 is DENIED; the Motion for Partial Summary Judgment filed by the plaintiff on December 5, 2007 is GRANTED; the Motion for Summary Judgment of the defendant filed on January 22, 2008 with regard to the DISMISSAL of the *Counterclaim* filed by the third party defendants is GRANTED; the Motion for Summary Judgment filed by the defendant on

January 22, 2008 is DENIED in part with regard to the return of the payments received by the third party defendants.

By virtue of Rule 43.5 of the Rules of Civil Procedure, 32 L.P.R.A. App. III R. 43.5, there is no reason to postpone issuing judgment regarding such claims up to the final resolution of this case.

Pursuant to what is provided herein, we have yet to resolve the claim for damages filed by the plaintiff, as well as the counterclaim filed by RG alleging lack of diligence by Iser Koricki claiming his rights.

A status hearing is scheduled to schedule the continuation of the proceedings in accordance with what has been resolved, on February 25, 2009 at 9:00 AM.

RECORD AND NOTIFY.

In San Juan, Puerto Rico, October 17, 2008.

s/illegible
REBECCA DE LEON RIOS,
SUPERIOR COURT JUDGE

GRISELDA RODRIGUEZ COLLADO
I CERTIFY
Acting GENERAL CLERK
BY: S/illegible
WILNELIA ERAZO CRUZ
DEPUTY CLERK

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN PART

KORICKI MGUELACHULI, ISER
PLAINTIFF
VS.
RG PREMIER BANK OF PR
DEFENDANT

CASE: KICD2006-1449
ROOM: 0504

COLLECTION OF MONIES
COLLECTION OF MONIES
CAUSE/CRIME

ATTY. VIDAL GAMBARO WINSTON
PO BOX 193673
SAN JUAN PR 00919-3673

NOTIFICATION OF JUDGMENT

THE UNDERSIGNED CLERK NOTIFIES YOU THAT THIS COURT HAS ISSUED JUDGMENT IN THE ABOVE CAPTIONED CASE ON THE 17TH OF OCTOBER OF 2008, WHICH HAS BEEN DULY RECORDED AND FILED IN THE RECORD OF THIS CASE, FROM WHICH YOU MAY FIND OUT IN DETAIL THE TERMS OF THE SAME.

AND SINCE YOU ARE OR REPRESENT THE PARTY AFFECTED BY THE JUDGMENT, WITH REGARD TO WHICH AN APPEAL MAY BE FILED, I ADDRESS THIS NOTICE TO YOU, HAVING FILED A COPY OF THE SAME IN THE RECORD ON NOVEMBER 07, 2008.

GUERRERO CALDERON JORGE L
GALLARDO COND SUITE 502 301 RECINTO SUR ST
SAN JUAN PR 00901-1920

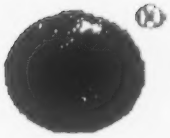
MELLADO VILLAREAL JAIME ALFONSO
165 PONCE DE LEON AVE SUITE 101
SAN JUAN PR 00917-1233

SAN JUAN, PUERTO RICO, NOVEMBER 07, 2008.

GRISELDA RODRIGUEZ COLLADO, ACTING CLERK

s/illegible

BY: ERAZO CRUZ WILNELIA
DEPUTY CLERK



1 of 1 DOCUMENT

ISER KORICKI MIGUELA-CHILI BERTHA MIGUELA-CHILI, Plaintiffs vs RG PREMIER BANK OF P.R., RG INVESTMENT CORP., RG MORTGAGE CORPORATION, Defendants/Third-Party Plaintiffs vs MAIDA KORICKI LIBEZUK (a/k/a Maida Nussbaum); EDWARD NUSSBAUM (a/k/a Ed Nussbaum); and the legal conjugal partnership comprised between them, Third-Party Defendants

CIVIL 06-2042CCC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

2007 U.S. Dist. LEXIS 12865

February 23, 2007, Decided
February 23, 2007, Filed

COUNSEL: [*1] For Iser Koricki Miguelachili, Bertha Miguelachili, Plaintiff: Jorge L. Guerrero-Calderon, LEAD ATTORNEY, San Juan, PR.

For RG Premier Bank Of PR, RG Investment Corp., RG Mortgage Corporation, Defendant: Jairo A. Mellado-Villarreal, LEAD ATTORNEY, Mellado & Mellado Villareal, San Juan, PR; Odalyse Cedeno-Morales, LEAD ATTORNEY, Mellado & Mellado Villareal, San Juan, PR.

For Maida Koricki-Libezuk, also known as Maida Nussbaum, Edward Nussbaum, doing business as Ed Nussbaum, Conjugal Partnership Nussbaum-Koricki, Third Party Defendant: Winston Vidal-Gambaro, LEAD ATTORNEY, Winston Vidal Law Office, San Juan, PR.

For RG Premier Bank Of PR, RG Investment Corp., RG Mortgage Corporation, Counter Defendant: Jairo A. Mellado-Villarreal, LEAD ATTORNEY, Mellado & Mellado Villareal, San Juan, PR; Odalyse Cedeno-Morales, LEAD ATTORNEY, Mellado & Mellado Villareal, San Juan, PR.

JUDGES: CARMEN CONSUELO CEREZO, United States District Judge.

OPINION BY: CARMEN CONSUELO CEREZO

OPINION

REMAND ORDER

This case was removed by third-party defendants based only on the third-party claim brought against

them by original defendants R-G Premier Bank of PR, R-G Investment Corp. and R-G Mortgage Corporation [*2] (the R-G defendants), all of which have requested that the action be remanded to the Commonwealth court based on the absence of federal question or diversity jurisdiction and because it is generally accepted that third-party defendants do not have the right to remove actions to federal courts. Since this last issue would be dispositive of the matter, we have examined the allegations of the complaint, answer to the complaint and the third-party complaint.

This action was commenced in the Commonwealth of Puerto Rico, San Juan Superior Court, by Iser Koricki-Miguelachili and his mother, Bertha Miguelachili, claiming that as sole heir of Salomon Koricki, Iser contacted the R-G defendants in writing on several occasions requesting that he be paid the interest due on his father's investment accounts as well as reports regarding such investments. It is alleged that, after several endeavors, he received some documents from his father's files with R-G which reflected that R-G had sent accrued interest on certain GNMA's belonging to his father to one Maida Nussbaum in the sum of approximately $ 39,000.00 taken from his father's account. He claims that these disbursements were made without notice [*3] to him despite the letters that he had sent to the R-G defendants. The following allegations are relevant to the nature of plaintiff's claims:

-- "The plaintiff is entitled to the defendant RG paying him interest and the illegal disbursements made from Salomon's accounts to another person other than the plaintiff, plus interest." Complaint, P 11.

-- "Because the defendant RG did not exercise its duty of vigilance, lack of precaution, care, supervision . . . as a consequence of the highly illegal and negligent acts and omissions . . . wherein the plaintiff has been deprived of his property and the enjoyment of his property, for not having received the monies that were disbursed from Salomon's accounts, rather that they were being sent to another person, other than the plaintiff . . . causes and will cause severe damages to the plaintiff, including, but not limited to, emotional and moral damages, in excess of $ 50,000 for each one of the plaintiffs . . . in addition to the other amounts claimed." Complaint, P 12.

The R-G defendants answered and counterclaimed. The counterclaim against plaintiffs describes three GNMA's in the sum of $ 25,000.00, $ 200,00.00 and $ 50,000.00 all issued [*4] on August 15, 2002 which were among the securities of an investment account which counter claimant states was owned and held by deceased Salomon Koricki, the principal plaintiff's father who died on May 25, 2003 leaving plaintiff as his sole heir. It is alleged at P 4 of the counterclaim that, either directly or through their attorneys, the plaintiffs knew of the claims of the third-party defendants regarding the ownership and the interest accrued on such securities and that they also knew that the third-party defendants were collecting the interest that said securities accrued monthly, even before Salomon Koricki died. The counterclaimants further allege that plaintiff never informed them that he had been appointed judicial administrator of his father's estate since September 9, 2003 and that in violation of his duties as such he "did not do anything to avoid the third-party defen-

dants to continue collecting the interest accrued by the securities described above." Counterclaim, P 6. The first cause of action of the counterclaim avers that plaintiffs induced the defendants to pay the securities alleging they were the sole beneficiaries and owners thereof although they knew that the [*5] third-party defendants were claiming to be the only owners of the securities and the interest accrued. The second cause of action avers that as a result of the plaintiff's negligence in the exercise of his duties as judicial administrator of his father's estate they incurred in damages or will incur in damages as a consequence of delivering the securities to plaintiff Iser Koricki to the prejudice of the third-party defendant. Further negligence is charged in the third cause of action to plaintiffs for having made incomplete/incorrect representations upon which defendants allegedly relied to deliver the securities to them despite the controversy over the GNMA's. Accordingly, they state in the fourth cause of action that the third-party defendant had claimed that defendants return the securities to them and that plaintiffs are directly liable for what third-party defendants claim against the R-G defendants.

Defendants simultaneously filed a third-party complaint against the Nussbaums in which the same GNMA's issued on August 15, 2002 held in the account of Salomon Koricki are described. In both the counterclaim and the third-party complaint the R-G defendants state that by information [*6] and belief the securities described were property which title Mr. Salomon Koricki shared in community with his sister, the third-party defendant. The first cause of action alleges that the third-party defendant induced the defendants to pay them the interest of the secu-

rities alleging they were the beneficiaries and sole owners and that these representations were made by them knowing that the plaintiff was the only heir of Salomon Koricki and that he claimed to be the only owner of the securities. Third-party plaintiff claimed that through these erroneous representations third-party defendants obtained undue payment of the totality of the interest due on the GNMA's.

Third-party defendant Mayda Nussbaum filed an answer to the third-party complaint which also contains a counterclaim on November 20, 2006 (docket entry 10) where she imputes to the R-G defendants diversion of funds belonging to her in violation of breach of contract and federal statutes and regulations. She raises several instances in which R-G paid her brother before his death while failing to make payments to her even though she owned each of the GNMA's as a tenant in common with him. These claims, however, are not relevant [*7] to the Court's determination regarding remand which is limited to the claims raised in the complaint, be it the original complaint filed by the son or the third-party complaint filed by the bank.

The claims contained in the complaint and the third-party complaint have common issues of fact regarding the representations of plaintiffs to the defendants and representations made by the third-party defendants to the third-party plaintiffs on the matter of ownership and payment of interest on the securities. The third-party complaint is not a separate and independent claim from the original complaint.

Courts have generally held that third-party defendants do not have a right to remove cases to fed-

eral courts. *Lewis v. Windsor Door Co., 926 F.2d 729, 732 (8th Cir. 1991); Thomas v. Shelton, 740 F.2d 478, 486 (7th Cir. 1984); Elsis v. Hertz Corp., 581 F.Supp. 604, 607 (E.D.N.Y. 1984).* Those that have recognized that the cause of action was removable by a third-party defendant have dealt with situations where the third-party complaint presents a controversy that is separable from that brought by the original plaintiff. *Central of Georgia Ry. v. Riegel Textile Corp., 426 F.2d 935 (5th Cir. 1970).* [*8] The relevant pleadings, i.e. complaint and third-party complaint, reflect that such is not the case before us.

Likewise, we also adhere to the view of those courts which in cases where the original defendants did not seek removal understand it is unjust to permit a party not sued by the plaintiff to compel the plaintiff to try the case in a forum not selected by him. *Holloway v. Gamble-Skogmo, Inc., 274 F.Supp. 321 (N.D.Ill. 1967); Burlingham, Underwood, Barron, Wright & White v. Luckenbach Steamship Co., 208 F.Supp. 544 (S.D.N.Y. 1962); Brown v. Hecht Co., 78 F.Supp. 540 (D.Md. 1947).*

For the reasons stated, the R-G defendants' Motion to Remand (**docket entry 7**), opposed by the third-party defendants (**docket entry 14**), is GRANTED. The Clerk of Court is ORDERED to remand the present case to the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, for further proceedings.

SO ORDERED.

At San Juan, Puerto Rico, on February 23, 2007.

S/ CARMEN CONSUELO CEREZO

United States District Judge